SAW KIM HAI & ANOR. v. REG.

[A.Cr.J. (Spenser Wilkinson J.) October 15, 1955]

[Penang — Criminal Appeal No. 35 of 1955]

Common Gaming Houses Ordinance, 1953, s. 4(1)(c) — Assisting in carrying on a public lottery — Presumptions under s. 11 of the Ordinance — Whether it is necessary to prove lawful entry into premises — Charge.

The appellants in this case were convicted on 2 charges of assisting in carrying on of 100 number lottery and assisting in the carrying on of 1,000 number lottery, offences under s. 4(1)(c) of the Common Gaming Houses Ordinance. On the appeal it was argued that as the police had not strictly proved that their entry to the premises had been carried out in accordance with the provisions of the Ordinance the presumption under s. 11 of the Ordinance did not arise.

Held: (1) the presumption raised by s. 11 of the Common Gaming Houses Ordinance arises as soon as it is proved that a person has been found in possession of the documents therein referred to, no matter how or where that person was found; (2) where an operation, such as a character lottery, is conducted by a single person or a group of persons in relation to a single specific sweepstake the whole operation constitutes a single lottery and therefore in this case there should have been one charge and not two.

Cases referred to:—

(1) *Wong Yiap Long v. Public Prosecutor* (1955) M.L.J. 132.

(2) *Loh Wah v. Public Prosecutor* 7 F.M.S.L.R. 197.

(3) *Kuruma v. R.* (1955) A.C. 197.

(4) *Public Prosecutor v. Woo Fong* (1955) M.L.J. 235.

MAGISTRATE'S CRIMINAL APPEAL.

Lee Thean Chu for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellants were jointly charged first with assisting in the carrying on of 100 number lottery and secondly with assisting in the carrying on of 1,000 number lottery at the same time and place, both charges being laid under section (4) (1) (c) of the Common Gaming Houses Ordinance, No. 26 of 1953.

Mr. Lee Thean Chu on behalf of the appellants sought to rely upon the recent decision in the case of *Wong Yiap Long v. Public Prosecutor*[1] and argued that as in the present case the Police had not strictly proved that their entry into the premises had been carried out in accordance with the provisions of the Ordinance the presumption under section 11 did not arise.

The report of *Wong Yiap Long's*[1] case is very scanty; no authorities appear to have been cited; the facts are not fully set out; nor is it clear whether in that case any of the presumptions under the Betting Ordinance, 1953 were relied upon, and if so, which. Mr. Lee Thean Chu relied upon this case as authority for the general proposition that before any presumption in the Common Gaming Houses Ordinance can be raised it is necessary to prove strictly that the entry by the Police was lawful.

I am unable to agree with this contention and I do not think that the learned Judge who decided *Wong Yiap Long's*[1] *case* intended to lay down so wide a proposition. All the presumption sections in the Betting Ordinance except section 8 contain a reference to "a place entered under this Ordinance", and there is no doubt on the authorities that where a section provides for a presumption in respect of such a place then, unless the place was entered in accordance with the relevant provisions of the Ordinance, the presumption does not arise. Similar considerations apply to the presumptions provided for in sections 19 and 20 of the Common Gaming Houses Ordinance, which refer to places entered under the Ordinance. See *Loh Wah v. Public Prosecutor*[2].

In my opinion, however, *Loh Wah's*[2] *case* does not affect the construction of section 11 of the Common Gaming Houses Ordinance, which refers neither to a place nor to any entry and provides simply that a person found in possession of certain documents shall be presumed until the contrary is proved to be assisting in a public lottery then in progress. It is the possession, irrespective, of place, which raises the presumption under this section.

It is settled law that when an accused person is before a Court the Court has jurisdiction to try him notwithstanding the fact that his arrest may have been illegal, and it has recently been held by the Privy Council that the fact that evidence has been illegally obtained does not affect the question of its admissibility (*Kuruma v. Queen*[3]). Even, therefore, if the evidence of possession by these appellants of the documents in question in this case was illegally obtained (and there was really no suggestion that it was) that would not affect its admissibility. I was of opinion, therefore, that the decision in the case of *Wong Yiap Long v. Public Prosecutor*[1] had no bearing upon the presumption raised by section 11 of the Common Gaming Houses Ordinance and that a presumption arises under this section as soon as it is proved that a person has been found in possession of the documents therein referred to, no matter where or how that person was found.

Mr. Lee Thean Chu next referred to a recent decision of Thomson J. in Ipoh (*Public Prosecutor v. Woo Fong*[4]) which has not yet been reported in any law reports but has appeared in the press, in which he held that where an operation, such as a character lottery, is conducted by a single person or a group of persons in relation to a single specific sweepstake then the whole operation constitutes a single lottery. The remarks of the learned Judge as reported express so closely my own views on the subject that I had no hesitation in adopting them and in holding that in this case there should have been one charge and not two. I therefore quashed the conviction on the second charge, maintaining the conviction on the first charge.

I would not normally interfere with a sentence of this kind unless it was manifestly wrong, but having quashed the conviction on the second charge it became necessary to reconsider the sentence in respect of the first charge. I felt that the scale of the operations and the position and employment of the two appellants were such that the fine imposed by the learned Magistrate erred, if anything, on the side of severity. I therefore fixed the fine on the first charge at $1,000 in the case of each accused.

Order accordingly.

Re LEE THEAM NEOH, DECD.; OH PENG WAH v. LIM SAY LIEW (m.w.) & ORS.

[O.C.J. (Spenser Wilkinson J.) October 10, 1955]

[Penang — Originating Summons No. 41 of 1955]

Will — Appointment of executor — Whether executor is to take property on trust or beneficially — Civil Law Ordinance (Cap. 42), s. 10.

In her will, the testatrix provided as follows: "In the event of my death, I entrust the land and rubber plantation to Ong Giok Tuan and Lim Say Liew for administration for ever." The two persons named obtained probate of the will. The question that arose was whether the testatrix's property mentioned in the will went to the two named persons beneficially or as trustees for the persons entitled as upon intestacy.

Held: (1) by virtue of s. 10 of the Civil Law Ordinance, the executor of a will is deemed to be a trustee unless it appears by the will that the person so appointed executor was intended to take such residue beneficially; (2) in this case far from their being a contrary intention, the use of the word "entrust" indicated that the persons named were to take the property upon trust.

APPLICATION by way of Originating Summons.

Chen Choon Poon for the plaintiff.

G. H. Goh for the defendant.

Ong Peng Loon and *M. Abraham* for the others.

Spenser Wilkinson J. : — This was an application by way of Originating Summons for the construction of a will and consequential relief.

The will is a short one and it will be convenient to set it out in full. It reads as follows :—

"The maker of (this) document is Lee Theam Neoh. Now, Lee Theam Neoh, being old and ill, and fearing that she may die, has requested Teoh Hock Aun to be her attorney in respect of a piece of land at Batu Feringhi purchased for $500/- and a rubber plantation at Telok Bahang purchased for $10,000/- (I) now (execute) the power of attorney (kuasa) in favour of Teoh Hock Aun. In the event of my death, (I) entrust the land and the rubber plantation to Ong Giok Tuan and Lim Say Liew for administration for ever. This is mutual consent. For fear that words of mouth are not evidence, this document is made out and kept as proof."

The will is dated the 5th March, 1928 and the testatrix died on the 13th April, 1928. On the strength of the words "entrust the land the rubber plantation to Ong Giok Tuan and Lim Say Liew for administration for ever" these two persons applied for and obtained probate of the will as executrices. Ong Giok Tuan having died the defendant Lim Say Liew is the surviving executrix of the estate.

The question that arises upon this will is whether the testatrix's property mentioned in the will goes to the two named persons beneficially or as trustees for the persons entitled as upon an intestacy. On the one hand it was argued that the effect of the will was simply to appoint Ong Giok Tuan and Lim Say Liew as administratrices to administer the property in trust for the beneficiaries and on the other hand that there was an absolute gift to Ong Giok Tuan and Lim Say Liew, who were both wives of sons of the testatrix.

In the course of the argument I asked Counsel whether in their view the Executors Act, 1830 applied in the Colony and the view was expressed that it did not. I find, however, that the effect of this Act is reproduced in section 10 of the Civil Law Ordinance. Sub-section (1) of that section reads as follows :—

"10. — (1) When any person dies or has died, having by his will, appointed any person to be his executor, such executor shall be deemed to be a trustee for the person, if any, who would be entitled to the estate in case the person died intestate in respect of any residue not expressly disposed of, unless it appears by the will that the person so appointed executor was intended to take such residue beneficially."

The effect of this provision is set out in *Williams* on Executors, 13th edition page 885 as follows :—

"If the testator died between 1830 and 1926 the position was governed by the Executors Act, 1830. The effect of that Act was to shift the burden of proof. The executor had to prove, as against the next-of-kin, a distinct intention, to be found in the testamentary instrument, that he should take the residue beneficially. If the executors failed to prove this intention they held the residue in trust for the persons entitled under the Statutes of Distribution"